No. _____

In the Supreme Court of the United States

FRANK G., PETITIONER

v.

JOSEPH P. AND RENEE P.-F., ET AL.

On Petition for a Writ of Certiorari to the Appellate Division, Supreme Court of New York, Second Judicial Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For nearly a century, this Court has consistently held that an involved biological parent has a Fourteenth Amendment right "to direct the upbringing and education of [his] children." *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 529 (1925); *Troxel* v. *Granville*, 530 U.S. 57, 61 (2000). Yet in the wake of this Court's decision in *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015), which required states to recognize same-sex marriages, the highest courts of several states have held that the parental rights under decisions such as *Pierce* and *Troxel* must be relaxed to accommodate the interests of persons in romantic relationships who become involved in the raising of their partners' biological children. For example, the New York Court of Appeals held in *In re Brooke S.B.* v. *Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016), that, if the parties make a pre-birth agreement, a same-sex or opposite-sex partner of a biological parent has the same rights as a biological parent.

In this case, based on *Brooke S.B.*, the courts below awarded parental rights to petitioner's former partner, who is neither a biological nor an adoptive parent of petitioner's twins, and then awarded the former partner sole physical and legal custody, giving him full decision-making power. The question presented is:

Whether a state violates a biological parent's rights under the Fourteenth Amendment's Due Process Clause when it strips the parent of custody in favor of a former partner who is not the child's biological or adoptive parent, and without affording a presumption that the parent is acting in the best interests of the child.

PARTIES TO THE PROCEEDING

To preserve confidentiality, the identities of the parties and petitioner's children are in a sealed letter on file with the clerk.

Petitioner Frank G. is the biological parent of the twins who are the subject of the custody dispute in this case. Respondent Joseph P. is the former partner of petitioner and is the twins' uncle. Respondent Renee P.-F. is the biological mother and Joseph's sister. Respondents G.F.P.G. and L.J.P.G. are the twins.

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INTRODUCTION

Decisions of this Court have long protected the rights of biological and adoptive parents to direct the upbringing of their children. *E.g., Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-535 (1925); *Troxel* v. *Granville*, 530 U.S. 57, 61 (2000). And as part of that protection, this Court has long held that the Fourteenth Amendment's Due Process Clause requires a presumption that biological and adoptive parents act in their children's best interests. *E.g., Troxel*, 530 U.S. at 68; *Santosky* v. *Kramer*, 455 U.S. 745, 753-754 (1982).

But some state courts of last resort are ignoring these principles. These courts rule that spouses or cohabitating partners of biological parents can gain parental rights without adoption, in competition with the rights of biological and adoptive parents. The New York Court of Appeals, for example, has held that if there is "clear and convincing evidence that the parties agreed to conceive a child and to raise the child together" then "the non-biological, non-adoptive partner has standing to seek visitation and custody" *In re Brooke S.B.* v. *Elizabeth A.C.C.*, 61 N.E.3d 488, 490 (N.Y. 2016). Other courts are applying similar rules to both same-sex and opposite-sex couples. The price of these decisions is that the rights of biological and adoptive parents are diminished, eroding or eliminating the constitutional protections previously recognized by this Court.

In weakening these protections, some of these opinions rely on decisions in which this Court addressed the rights of same-sex couples when their interests are aligned against state laws that treat same-sex and op-

posite-sex couples differently—decisions such as *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015), and *Pavan* v. *Smith*, 135 S. Ct. 2075 (2017). But this Court has never addressed how this line of cases should be applied when the dispute is *not* between the couple and the state, but between the partners or spouses. Nevertheless, some state courts have erroneously held that such cases require a diminution in the rights of biological parents to accommodate the interests of romantic partners or spouses who are neither biological nor adoptive parents.

That is what happened to Petitioner Frank G. Relying upon the New York Court of Appeals' decision in *Brooke S.B.,* the trial court and intermediate appellate court below held that Frank's former partner, Respondent Joseph P., who is merely an uncle to Frank's twin children, should have legal and physical custody. In so holding, the state courts failed to afford Frank the ordinary presumption that a biological parent acts in the best interests of his children. As a result, Frank is left with limited visitation, but without the right to direct the upbringing of his children.

Frank's constitutional rights as a biological parent would have been protected not only under decisions of the highest state courts in Idaho, Connecticut, and Michigan, but also under decisions of intermediate appellate courts around the country. These clear conflicts call for resolution by this Court.

OPINIONS BELOW

The Appellate Department's decisions are reported at 161 A.D.3d 1163 and 142 A.D.3d 931 and reprinted at 1a and 160a. The trial court's opinion granting custody to Joseph is unpublished but are reprinted at 10a. The Court of Appeals' opinions denying review are reprinted at 165a and 166a.

JURISDICTION

The Appellate Department's opinion was issued on May 30, 2018. The Court of Appeals denied review on December 11, 2018. Justice Ginsburg granted an extension of time to file this petition until May 10, 2019.

This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment states in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Legal Framework

This case is about preserving a parent's liberty "to direct the upbringing and education of [their] children," a right protected by the Fourteenth Amendment as interpreted in decisions such as *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 529 (1925). The Court has reaffirmed this right in several other cases over the years, including *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-233 (1972), and *Troxel* v. *Granville*, 530 U.S. 57, 61 (2000). *Yoder* reaffirmed a parent's rights to direct the education of their children, while *Troxel* decided that, absent a compelling reason, the State could not interfere in a parent's right to raise his or her children.

This Court has also specifically held that these rights are enjoyed only by those who are the children's biological or adoptive parents, regardless of the relationship a third party may have with them. For example, in *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), foster parents sought rights similar to biological and adoptive parents, based on the idea that a psychological bond was created between the foster parents and foster children. While not squarely holding that foster parents have *no* Fourteenth Amendment rights, the Court reaffirmed that biological or adoptive parents retain the constitutional right to direct the upbringing and education of their children, regardless of the interests of others who might have played a parenting role. *Id.* at 842-847.

More recently, the Court decided in *Pavan* v. *Smith*, 135 S. Ct. 2075 (2017), that in certain circumstances a state cannot forbid the partner of a biological mother from being listed on a birth certificate. But, as Justice Gorsuch wrote in his *Pavan* dissent, this does not mean that *Obergefell* obliterated the legal significance of biological parent relationships. *Id.* at 2079.

B. Factual Background

That brings us to this case. From January 2009 to 2014, Frank G. and Joseph P. were in an informal same-sex relationship in New York. Pet. 23a. They made a joint decision to have children. Pet 20a. Joseph's sister, Renee P.F., had previously volunteered to carry a child for her brother. Pet. 3a. The parties agreed that Frank would be the sperm donor and Renee would donate eggs and carry the children. Pet. 21a. After she was pregnant, they entered into a surrogacy contract in which Renee agreed to relinquish her parental rights. Pet. 3a.

Renee gave birth to twins, G.F.P.G. and L.J.P.G., in early 2010. Pet. 3a. Their birth certificates list Frank as father and Renee as mother. Pet. 74a.

At first, Frank and Joseph generally lived together with the children, and Renee remained in limited contact. Pet. 4a, 20a. As the relationship deteriorated, the children continued to live with Frank, though Joseph continued to see them frequently. Pet. 20a-21a. Ever since the year of the twins' birth, Frank had had safety concerns about Joseph's behavior and the impact of that behavior on his children. For this reason he refused to let Joseph adopt the children. Pet. 29a. In late April 2014, Frank and Joseph had an argument, and

as of May 2014. Joseph and Renee no longer saw or communicated with the children. Pet. 4a.

In December 2014 Frank moved to Florida with the twins to be with his mother, sister, and aunt and to seek a better life for his family. Pet. 4a. He relied on then-applicable New York law, which held that individuals like Joseph were not legal parents. See *Matter of Alison D.* v. *Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). Frank was much more professionally successful in Florida and was better able to pay for the children's needs. Pet. 8ea-8a. For the six months prior to moving to Florida, Frank did not hear from Joseph or Renee at all, so he relocated without notifying Joseph, who had cared for the twins but was not their legal parent, or Renee, who had never sought custody and who Frank assumed had given up her parental rights through the surrogacy contract. Pet. 85a, 86a, 22a, 123a. He also sought legal advice before moving. Pet. 85a-86a.

C. Procedural History

Litigation began following the relocation. Pet. 4a. Joseph initially filed a guardianship action, and Renee filed a separate custody claim. Pet. 4a. In March 2015, Frank was forced to return to New York to petition for custody and for permission to relocate with the children to Florida, which the family court denied a month later. Pet. 4a. In June 2015, Joseph withdrew his guardianship petition and filed a petition for custody. Pet. 4a. Frank then moved to dismiss Joseph's custody petition on the ground that Joseph was not the twins' parent and thus lacked standing. Pet. 4a.

In August 2015, the trial court ruled in favor of Joseph and his sister: Despite the surrogacy contract, according to the court, Renee remained the legal mother

of the twins and therefore had grounds to object to Frank's intended return to Florida. Pet. 4a. With little analysis, the court also held that Joseph had standing to seek parental custody. Pet. 4a-5a.

Frank appealed to New York's Appellate Division, Second Department, which stayed the trial court's determinations for over a year from May 2015 until June 2016. Pet. 21a. During that time, the children remained with Frank, with whom they had lived almost continuously for their whole lives. In July, the court granted Joseph and Renee one week of visitation with the twins, but then the children went back to their biological father. Pet. 44a.

While the appeal was the pending in the Second Department, in August 2016, New York's highest court decided *In re Brooke S.B.* v. *Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016), which overruled the court's previous definition of "parent" as either a biological parent or legal parent by way of adoption. See *In re Alison D.* v. *Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). In *Brooke S.B.*, two women in an informal same-sex relationship had a child together, with one of the women being impregnated with donor sperm and then carrying the child. *Brooke S.B.*, 61 N.E.3d at 490-491. After the women separated, the biological stranger sought custody of the child from the biological mother. *Ibid.* The court held that "where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody." *Id.* at 490.

After *Brooke S.B.*, the Appellate Division in this case affirmed the family court on different grounds.

The court stated that Joseph sufficiently demonstrated that he and Frank had entered into an agreement to conceive children and raise them together as parents, and therefore that Joseph could have standing to seek parental custody and visitation even though he was not the children's biological or adoptive parent. Pet. 164a. Frank sought review in the New York Court of Appeals, but the court declined. Pet. 165a.

On remittitur to the family court in February 2017, the trial judge gave full legal and physical custody of the twins to Joseph, allowed at-will visitation for Renee, yet granted Frank only limited visitation. Pet. 5a. The trial court called Frank "unfit to be the custodial parent" based solely on the fact that he took the children to Florida—a decision that he was legally allowed to make until *Brooke S.B.* See Pet. 121a-123a; *Alison D.* v. *Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). With this decision, Frank went from being his children's primary custodian to seeing them only a handful of days per month.

Frank appealed the custody decision to the Second Department, arguing that *Brooke S.B.* should not be interpreted to authorize parental status to a third-party legal stranger (Joseph) when there were already two legal parents (Frank and Renee). This decision thus gave the children three legal parents.

Without meaningful reasoning, the Second Department denied Frank's appeals because, it claimed, Frank's arguments failed to present new evidence. Pet. 6a. When Frank appealed again to the Court of Appeals, his attempts to regain custody of his children from a non-biological, non-adoptive parent were denied yet again on December 11, 2018. Pet. 155a.

REASONS FOR GRANTING THE PETITION

I. Certiorari is warranted because *Brooke S.B.* and the decision below conflict with decisions of this Court and other state courts of last resort, which protect the due process rights of involved biological or adoptive parents to direct the upbringing of their children.

The decision below and the New York Court of Appeals case it relies on, *Brooke S.B.*, both violate bedrock due process decisions of this Court. Moreover, state supreme courts are now split over whether biological and adoptive parents retain their rights when a parent's romantic partner—be the partner same-sex, opposite-sex, formal or informal—seeks to be declared a parent or entitled to custody without adopting the child. Only this Court can address the split and bring clarity to this crucially important area of law.

A. Under *Pierce*, *Troxel*, and other decisions of this Court, involved biological parents have a right to control the upbringing of their children, absent a finding of unfitness.

In a long string of cases, this Court has held that involved biological or adoptive parents have a Fourteenth Amendment right to manage their children's upbringing.

1. For example, this Court held in 2000 that biological and adoptive parents have a right to control access to their children. In *Troxel* v. *Granville*, a Washington law gave any person the right to seek visitation of a

child in a custody proceeding. 530 U.S. 57, 61 (2000). Following the death of their son, his parents (the children's grandparents) sought the right to visit their grandchildren under the statute. *Id.* at 60-61. The mother responded that she had "[t]he right to raise [her] children without state interference" and that "[t]his privileged right is not to be taken away and given to the state at the whim of a grieving relative or any other person[.]" Merits Br. of Tommie Granville, *Troxel* v. *Granville*, No. 99-138 at 25.

This Court agreed. In a plurality opinion, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Ginsburg and Justice Breyer, noted that there was no finding or even accusation that the mother was unfit. Based on this, the plurality built on *Pierce* and held that "there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68 (plurality). The Washington trial court's decision was held unconstitutional because it "applied exactly the opposite presumption[.]" *Id.* at 69.

Justice Souter added a fifth vote to the *Troxel* plurality on this central point, explaining that "a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment" and that "the right of parents to 'bring up children' … is protected by the Constitution[.]" *Id.* at 77 (Souter, J., concurring). On this basis Justice Souter would have held the Washington statute unconstitutional on its face. *Id.*

And Justice Sotomayor, writing for a four-justice dissent in a later case, added her support for the principles espoused in *Troxel*. *Adoptive Couple* v. *Baby*

*Gir*l, 570 U.S. 637, 686 (2013) (Sotomayor, J., dissenting). Her opinion reaffirmed that "[a] natural parent's desire for and right to the companionship, care, custody, and management of his or her children … is an interest far more precious than any property right." *Id.* at 673 (Sotomayor, J., dissenting) (quoting *Santosky*, 455 U.S. at 758-759 (1982)).

The rule in *Troxel* has its foundations in nearly a century of law. In *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, this Court addressed the constitutionality of a mandatory public education law. 268 U.S. 510, 529 (1925). Relying on its previous decision in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), this Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-535. Forty years later, *Pierce* was reaffirmed in *Wisconsin* v. *Yoder*, which favorably quoted this core holding. 406 U.S. 205, 232-233 (1972).

2. Moreover, this Court has stated that biological or adoptive parents are the only people squarely entitled to the protections of *Pierce* that were later strengthened in *Troxel*. In *Smith* v. *Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), a group of foster parents claimed—and the three-judge district court agreed—that "before a foster child can be peremptorily transferred from the foster home in which he has been living, … he" and the foster parents "[are] entitled to a hearing at which all concerned parties may present any relevant information to the [person] charged with determining the future placement of the child." *Id.* at 822. Affirming this claim would have granted protections to foster parents

similar to those of biological or adoptive parents: Because "a psychological tie is created between the child and the foster parents" that creates a "psychological family," the foster parents claimed a "liberty interest" in that family's survival under the Fourteenth Amendment. *Id.* at 839.

The Court further explained that, according to *Pierce*, "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.* at 843. While *Smith* ultimately did not determine whether the foster parents had constitutional rights,[1] the Court was clear that the biological parents *did* have constitutional rights that trumped any interests the foster parents might or might not have, however described or categorized. Historically, moreover, there has been only one way for an unmarried partner who is not a biological parent to get parental rights: adoption.[2]

In New York, for example, as in most states, a person who is not a biological parent may adopt the child: "Adoption is the legal proceeding whereby a person takes another person into the relation of child and

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[1] But see *Smith*, 431 U.S. at 856 (Stewart, J., concurring) (three-Justice concurrence would have held foster parents had no Fourteenth Amendment rights).

[2] As discussed in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), in many jurisdictions a married man can also become a legal parent if his wife becomes pregnant by another man. In that narrow circumstance, of course, the biological father does not acquire the due process rights ordinarily afforded to biological parents, because our nation's "history and traditions" protect the marital relationship over the biological relationship. *Id.* at 123.

thereby acquires the rights and incurs the responsibilities of parent in respect of such other person." N.Y. Dom. Rel. Law 110. But that, of course, is a far cry from giving parental rights to a romantic partner who has not assumed those sweeping responsibilities.

B. *Brooke S.B.* and the decision below defy *Pierce* and *Troxel* by holding that a biological parent can be deprived of custody in favor of a former partner who is neither an adoptive nor a biological parent, without any finding of unfitness for parenthood.

The problem that merits this Court's review is that the New York Court of Appeals in *Brooke S.B.* radically misinterpreted *Troxel*—and ignored *Smith*—and its approach is now being followed both in the lower New York courts and in other courts around the country. In *Brooke S.B.*, an unmarried[3] same-sex couple decided that one of them should become pregnant and bear a child. *Brooke S.B.* v. *Elizabeth A.C.C.*, 61 N.E.3d 488, 490 (N.Y. 2016). Following their separation, the biological mother initially gave the partner visitation rights but eventually decided to end those and move on with her life. *Ibid.* The partner sued for visitation. *Ibid.* Relying on Justice Stevens' *dissent* in *Troxel*, the New York Court of Appeals concluded that not recognizing same-sex partners as parents in some situations causes injustice. Based on that, the court

[3] During the *Brooke S.B.* parties' entire relationship, same-sex marriage was not yet recognized in New York. In a case consolidated with *Brooke S.B.*, the parties were in a formal domestic partnership. 61 N.E.3d at 490-492.

departed from *Troxel* by elevating the supposed parental rights of a person who is not a biological parent above the rights of a biological parent. *Id.* at 499-500.

1. After *Brooke S.B.*, the trial court in this case gave no weight to Frank's status as a biological parent. It instead applied its own "best interest of the child" standard without deferring to Frank's judgment. Pet. 137a. Four central features of the orders below make this clear:

- First, the court dismissed Frank's right to "act in the best interest of [his] children" as merely a "need to be in control." Pet. 124a-125a. But that's just the point: only biological and adoptive parents have a *right* to direct their children's lives under *Pierce* and *Troxel*.
- Following *Brooke S.B.*, the trial court repeatedly referred to Joseph as a "parent"[4] and repeatedly stated that Frank did not have the right to take the children away from Joseph.[5] By treating Joseph as a "parent" with rights on a par with Frank's rights, the lower courts once again flouted this Court's decisions in *Troxel* and *Pierce*, which limit the category of "parents" for due process purposes to biological and adoptive parents.
- The trial court also called Frank "unfit"[6] for custody purposes because he took the children away

[4] *E.g.* Pet. 132a.

[5] Pet. 147a, 151a

[6] The finding of unfitness was not a finding of unfitness necessary to terminate parental rights; rather it was a different kind of "unfitness"—that is, to be the custodial parent. Frank has never been deemed an unfit parent under cases like *Troxel* or *Stanley* v.

from Joseph.[7] This also flouts the *Troxel-Pierce* framework: Just as the grandparents in *Troxel* did not have a right to visit their grandchildren over the wishes of their mother, Joseph did not have the right to override Frank's constitutional "right to direct the care and upbringing of the children," which Frank exercised by moving them to Florida.

- Finally, the trial court assigned custody to Joseph over Frank, depriving Frank of the ability to control the upbringing of his own biological children, and giving that right instead to someone who is *not* a biological or adoptive parent.

In short, the trial court squarely relied on *Brooke S.B.* to award custody to Joseph, in violation of Frank's due process rights under the *Troxel-Pierce* line of cases

2. Both before and after trial, New York's intermediate appellate court twice endorsed that result under *Brooke S.B.* Pet. 6a; Pet. 163a. The appellate court also mimicked the trial court in finding Frank supposedly "unfit" for legal custody (but not parenthood) because of "Frank's refusal to allow Joseph"—who is not a biological parent—to have contact with the children for a time. Pet. 7a.

Illinois, 405 U.S. 645 (1972). He retains visitation rights. And the finding of unfitness by the court below was erroneously premised on the assumption that Joseph enjoyed parental rights despite the fact that he is neither a biological nor adoptive father. Indeed, the expert at trial referred to Frank as a "stellar" parent, excepting his actions in protecting his rights as a biological parent. Pet. 117a.

[7] Renee never has had custody and only sought custody below as a way to obtain custody for Joseph. Pet. 123a, 125a 78a.

The appellate court similarly relied on Frank's relocation to Florida, complaining that it distanced the children from Joseph, another "parent." Pet. 7a-8a. The separation from Joseph—a person not entitled to constitutional rights under this Court's decisions—was the sole basis for a finding of "unfitness for custody."[8]

3. *Brooke S.B.* and the decision below are not the only decisions that contradict *Pierce* and *Troxel*. For example, the Maryland Court of Appeals has also recently defied these decisions. In *Conover* v. *Conover*, 146 A.3d 433 (Md. 2016), two cohabiting women, Michelle and Brittany Conover, agreed that Brittany should become pregnant by artificial insemination. After a child was born, Michelle and Brittany married. *Id.* at 435. They then divorced, and Michelle sought custody.

As in *Brooke S.B.,* the Maryland Court of Appeals distinguished *Troxel* and held that Michelle—the non-mother—was also a parent, which of course reduced Brittany's ability to "directed the upbringing" of her biological child. *Id.* at 445-446. Calling *Troxel* "extremely narrow," the court ignored *Troxel*'s core holdings regarding the rights of biological parents. In the court's view, because the *holding* in *Troxel* was narrow, the language protecting the rights of parents was irrelevant. In language that would apply to any close child-adult relationship, the Court concluded that "a legal parent does not have a right to voluntarily cultivate their child's parental-type relationship with a

[8] Both courts below also dismissed other equitable factors, including the fact that the children had lived with Frank since birth almost without interruption, and that Renee had never had (and did not want) full custody.

third party and then seek to extinguish it." *Id.* at 447. But this actually violates *Troxel* and *Pierce*, which hold that biological and adoptive parents have the "right"—at least presumptively—to direct the upbringing of their children."

The Oklahoma Supreme Court has ruled similarly in the context of same-sex partners, relying on *Obergefell*. In *Ramey* v. *Sutton*, 362 P.3d 217, 221 (Okla. 2015), the court held that the nonbiological parent was entitled to a hearing to determine the best interests of the child. But in so doing, the Court ignored *Pierce* and *Troxel*. See generally *id.* Under these decisions of this Court, a biological parent has additional rights that a legal parent does not: the right to direct the upbringing of the children, and a presumption that the parent is a fit parent. By relying solely on the best interest of the child, *Ramey* eliminates these rights, and puts a thumb on the scale of the non-biological partner.[9]

Each of these lower court decisions creates a gaping exception to the rights recognized in *Troxel* and *Pierce*: Under these state court opinions, if a biological parent cohabitates for a while with a romantic partner, whether same-sex or opposite-sex, the parent runs a substantial risk of losing the constitutional right to control the upbringing of his or her child. And that, again, is what happened in this case.

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[9] The Arizona Supreme Court has issued a somewhat similar decision extending the presumption of paternity, which under the relevant statute applies only to men, to female same-sex partners as well. *McLaughlin* v. *Jones* 401 P.3d 492 (Ariz. 2017), *cert. denied sub nom. McLaughlin* v. *McLaughlin*, 138 S. Ct. 1165 (2018). But that case did not raise or address the fundamental conflict with *Pierce* present in this case.

C. Decisions of other state courts directly contradict *Brooke S.B.*

By contrast, the highest courts of other states have held that the *Pierce* and *Troxel* rights remain fully in force after *Obergefell*, directly contradicting *Brooke S.B.*

1. For example, in *Doe* v. *Doe*, 395 P.3d 1287, 1291 (Idaho 2017), the Idaho Supreme Court faced a situation in which a biological mother and her same-sex partner could not agree on custody. The couple had clearly agreed to raise the child together: they attended prenatal appointments together and for a time "lived as a family." *Id.* at 1288. However, the Court determined that as the "Mother made the decision to terminate the relationship between Child and Partner," that was the end of the matter: The mother "had that right, and while there may be a temptation to second-guess that decision, courts cannot do so. Parents have a constitutional right to care, custody, and control of their children." *Id.* at 1291.

Doe, if followed by the New York courts in this case, would have compelled that Frank receive custody. The sole reason Frank was deemed "unfit" to be a custodial parent was because he made the decision to terminate the relationship between the children and his former partner, Joseph, who had never adopted the children. Under *Doe*, Frank "had that right, and while there may be a temptation to second-guess that decision, courts cannot do so [as] [p]arents have a constitutional right to care, custody, and control of their children."

The same is true for *Brooke S.B.* There the biological mother "effectively terminated petitioner's contact with the child," which, in *Doe*, would not have been

"second-guessed." But, as explained above, *Brooke S.B. did* second-guess the decision of the biological parent by refusing to acknowledge the parent's unique biological status. See 61 N.E.3d at 491, 500. The conflict between the Idaho Supreme Court and the New York Court of Appeals could hardly be more clear.

2. The Connecticut Supreme Court ruled similarly to *Doe* in *Fish* v. *Fish*, 939 A.2d 1040 (2008), in which an aunt sought custody over the objection of one of the parents. The Connecticut Supreme Court concluded that, "Where the dispute is between a fit parent and a private third party … both parties do not begin on equal footing in respect to rights to care, custody, and control of the children." *Id.* at 1053. Thus, "[t]he parent is asserting a fundamental constitutional right. The third party is not." *Id.*

Here, of course, the twins' uncle, Joseph, is similarly a "private third party" that New York courts have now put "on equal footing in respect to rights to care, custody, and control of the children." Here again, if the dispute in this case had been litigated in Connecticut, next door to New York, Frank would have been granted custody of his children.

While not citing *Troxel* or *Pierce*, the Utah Supreme Court also rejected the de facto parent doctrine of *Brooke S.B.* in the context of a same-sex couple.[10] Intermediate appellate courts in Michigan[11] and Virginia[12] have also held that only biological and adoptive

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[10] *Jones* v. *Barlow*, 154 P.3d 808, 809 (Utah 2007).

[11] *Lake* v. *Putnam*, 894 N.W.2d 62, 67 (Mich. App. 2016).

[12] *Hawkins* v. *Grese*, 809 S.E.2d 441, 445-447 (Va. App. 2018).

parents have standing to seek custody—in sharp contrast to *Brooke S.B.* and the decision below.

Numerous other decisions in many states have held that a person in an opposite-sex relationship with a biological parent does not have the status of a biological parent and cannot be a de facto parent.[13] For example, the Vermont Supreme Court has declined to adopt a rule that "essentially would allow any former domestic partner to compel a biological parent to defend against the unrelated ex-partner's claim that he or she is a 'parent' entitled to judicially enforced parental rights and responsibilities." *Moreau* v. *Sylvester*, 95 A.3d 416, 423 (Vt. 2014). And it is easy to see why this is: If any cohabitating partner could claim parental status, courts would be overrun with attempts by deadbeat boyfriends and girlfriends to seek custody of their former partners' children with whom they have no biological or adoptive relationship—and then force the biological parent to pay child support.

But the rule adopted in *Moreau* and similar decisions cannot be squared with *Brooke S.B.* and other de facto parenting decisions, which effectively deprive biological or adoptive parents of the right to control the upbringing of their children. While some courts depart from *Moreau* only when there is a pre-birth agreement to give parental rights, that is no less problematic: Allowing a private agreement to confer parental rights on a non-biological, non-adoptive parent—at the expense of a biological or adoptive parent—undercuts not only the rights recognized in *Pierce* and *Troxel*, but the interest of state legislatures in regulating such relationships through adoption. And allowing state

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[13] *E.g. O'Dell* v. *O'Dell*, 629 So. 2d 891 (Fla. Dist. Ct. App. 1993).

courts to enforce private contracts—or even implied agreements—in place of state-run adoption procedures infringes the rights of parents to respond to changing circumstances in directing the upbringing of their children.[14]

3. In that regard, one of the ironies of this case is that, if Frank had been sued in courts near his home in Florida, he would have prevailed. Relying on precedent of the Florida Supreme Court regarding biological parents, Frank's own state intermediate appellate court has ruled that a same-sex partner does *not* have a constitutional right to visit the mother's biological children. *Russell* v. *Pasik*, 178 So. 3d 55, 57-58 (Fla. Dist. Ct. App. 2015).[15] The court ruled that "[w]hen, as in the present case, … it is a nonparent that is seeking to establish legal rights to a child, there is no clear constitutional interest in being a parent." *Id.* at 60. Thus, had Joseph sued in Florida, he would have lost, and Frank's rights as a biological parent would have been protected.

The conflict is clear: Frank would have a constitutional right in his domicile of Florida—and in Idaho, Vermont, and other states—that he does not have in New York: the long-protected right to control the care and upbringing of his children. This conflict urgently merits this Court's review.

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[14] The surrogacy contract in this case was unenforceable in New York.

[15] Frank resides south of Tampa where the Second District Court of Appeals, which decided the *Russell* case, has appellate jurisdiction.

D. More generally, the application of *Pavan* and *Obergefell* to disputes concerning the rights of biological and adoptive parents richly merits this Court's review.

Review is doubly warranted because this Court's decisions in *Obergefell* and *Pavan* create broader confusion about the fundamental rights of biological and adoptive parents to "direct the upbringing … of [their] children." *Pierce*, 268 U.S. at 534-535.

1. *Obergefell*, of course, recognized the substantive due process and equal protection rights of same-sex couples to marry. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015). But it did not address the rights of same-sex partners who are not biological or adoptive parents with respect to their partners' biological children. To be sure, in its reasoning, the Court enumerated "aspects of marital status" from which same-sex couples were traditionally excluded, including "child custody, support, and visitation rules." *Id.* at 2601. But it did not hold that same-sex partners, who have no biological or legal relationship to the child, must be treated the same as biological or adoptive parents in custody disputes. Such a holding would have contradicted *Pierce* and *Troxel*. See I.A, I.B, *supra*.

In short, this Court did not silently overrule *Pierce* and *Troxel* in *Obergefell*. And indeed, it would be absurd to suggest otherwise: Just two terms before *Obergefell*, Justice Sotomayor, joined by Justices Ginsburg, Kagan, and Scalia, reaffirmed the importance of biological ties in determining custody. *Adoptive Couple*, 570 U.S. at 686 (2013) (Sotomayor, J., dissenting).

2. Neither does *Pavan* resolve this issue. *Pavan* concerned the rights of a biological mother and her same-sex partner to have both their names listed on a

birth certificate. 137 S. Ct. 2075 (2017). There, unlike here, the interests of the biological mother and her spouse were united against the state—a state whose statutes already granted birth certificate access to genetic strangers. *Id. Pavan*, while it applied *Obergefell* in a new context, did not clarify the potential tension between its holding and *Troxel* or *Pierce*. It did not address the rights of involved biological parents. Nor could it have done so, as it did not involve whether parenting rights extended to a same-sex partner or spouse to the *exclusion* of a biological or adoptive parent.

Yet some state supreme courts have taken the limited holding in *Obergefell* and applied it in custody disputes between same-sex partners. For example, the Oklahoma Supreme Court relied directly on *Obergefell* in adopting a holding similar to *Brooke S.B.* in *Ramey* v. *Sutton*, 362 P.3d at 221.

Indeed, New York state courts are applying *Brooke S.B.* to protect three-person relationships that most agree are squarely outside the scope of *Obergefell*. For example, in *Dawn M.* v. *Michael M.*, a married man and woman were infertile, and artificial insemination ended in a miscarriage. *Ibid.* Eventually, the couple invited a third woman to live in their apartment, and eventually the three of them engaged in intimate relations and considered themselves a family. *Ibid.* The trio decided that the unmarried woman should have a child, with the man as the father. The plan succeeded. *Ibid.* However, after a time the two women moved out and continued their relationship with each other. *Id.* at 900-901. The Court ruled that all three parties must share custody, calling such an arrangement "the logical evolution of the Court of Appeals' decision in

Brooke S.B., and the passage of" New York's same-sex marriage law. *Id.* at 902-903.

Whether *Obergefell* should be extended to disputes between a biological parent and a biological stranger is surely a crucial question. Both holdings like *Brooke S.B.* and holdings that extend *Obergefell* the way *Dawn M.* does—by allowing children to have three parents—diminish the settled rights and obligations that make the family a fundamental building block of society. Barack Obama, *Dreams from My Father: A Story of Race and Inheritance* 337, 347 (2004 ed.) ("If you have something, then everyone will want a piece of it. So you have to draw the line somewhere. If everyone is family, no one is family.") (quoting Zeituni Onyango). Indeed, as the Chief Justice noted in *Obergefell*, in these sorts of cases "[t]here may well be relevant differences that compel different legal analysis." 135 S. Ct. at 2622.

In short, review is urgently needed to determine whether and to what extent *Obergefell* and *Pavan* should be read to curtail the parental rights recognized in *Pierce* and *Troxel*.

II. Certiorari is warranted to protect the due process right of biological parents to a presumption that they are acting in their children's best interests, an issue that is also subject to a conflict among state courts of last resort.

In the course of violating Frank's right to control the upbringing of his children, the New York courts also deprived him of his Fourteenth Amendment due process right to a presumption that he is acting in the best interests of his children. Because that deprivation conflicts with decisions of this Court and other state courts of last resort, this is an additional, powerful reason for granting review.

A. The decision below denied petitioner his due process right to a presumption that he is acting in his children's best interests.

As explained above, Frank is a fit parent—indeed, the expert on which the trial court relied called him a "stellar" parent. Pet. 108a, 109a, 117a. He is thus entitled to a presumption that he acts in the children's best interest in directing the care and upbringing of his children. See I.A, *supra.* (citing *Pierce* and *Troxel*). But *Brooke S.B.* stripped him of that presumption by holding that he and other biological parents lose the right to control whether a romantic partner can gain custody of the child. See *In re Brooke S.B.* v. *Elizabeth A.C.C.*, 61 N.E.3d 488 (2016).

1. Indeed, the court below extended *Brooke S.B.* to hold—seemingly as a matter of law—that a biological parent has no right to separate his children from his same-sex partner, even when that partner has not adopted the child. Pet. 6a. The courts below reached

that holding even though binding law at the time made clear that a romantic partner's involvement with a biological parent's children did not provide standing to the partner. See *Allison D.* v. *Virginia M.*, 572 N.E. 2d 27 (1991).

Frank's action in removing his children to Florida were thus entirely permissible under the law as it existed at the time.

2. But regardless of New York law, as recounted above, the New York courts in this case refused to accord Frank the presumption required by *Troxel,* that "fit parents act in the best interests of their children." 530 U.S. at 67.

The Court in *Troxel* explained this presumption at some length. Quoting *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979), the Court observed that "[t]he law's concept of family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions" and that "natural bonds of affection lead parents to act in the best interests of their children." 530 U.S. at 68. Thus, the Court explained, if "a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to [enter] the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent's children." *Id.* at 68-69. And the chief "problem" in *Troxel,* the Court held, was that the courts adjudicating the dispute "gave no special weight at all to [the biological mother's] determination of her daughters' best interests." *Id.* at 69.

The same is true in this case. The trial court, affirmed by the Appellate Division, roundly faulted Frank for seeking to separate his children from Joseph and for taking them to Florida, where he felt their life opportunities would be better than in New York. Under the *Troxel* "fitness" standard—adequately taking care of one's children—Frank was clearly a "fit" parent. Yet the New York courts "gave no special weight at all" to Frank's "determination of [his children's] best interests."

This too is a violation of *Troxel,* separate and apart from the lower courts' departure from the general principle applied in that case and others that parents have a general constitutional right to direct the upbringing of their children. And that violation likewise demands this Court's review.

B. The decisions of the New York courts conflict in principle with the due process decisions of the Michigan Supreme Court.

Not surprisingly, the decision below and *Brooke S.B.* conflict on this point with another state court of last resort, the Michigan Supreme Court. In *In re Sanders*, that court struck down a law that allowed both parents to be deprived of the "right to control the custody and care of [their] children," based on a finding that only one parent was fit. *In re Sanders*, 852 N.W.2d 524, 532 (Mich. 2014); see also *id.* at 527, 530-531. Relying on this Court's decision, *Sanders* noted that (1) parents' interest in the care, custody and control of their children "cannot be overstated," (2) one parent cannot rely on another parent to protect his rights, and (3) even if a parent is incarcerated, they still have certain rights, such as to choose their children's guardian during imprisonment. *Id.* at 543.

Building on these premises, the *Sanders* court held that there were *insufficient* "procedural safeguards" in place to protect the due process rights of the parent who had not been deemed unfit. *Id.* at 555.

The appellate opinion below and *Brooke S.B.* conflict in principle with *Sanders*: Under *Brooke S.B.*, there is no presumption that biological parents are fit parents or that they are acting in the best interests of their children. By eliminating that presumption, the court below eliminated the presumption that Frank is entitled to direct the upbringing of his children. Rather, because the court granted Joseph parental status, Frank's rights to control the children's upbringing were automatically limited.

By contrast, in *Sanders*, the Michigan Supreme Court specifically ruled that adjudication of one parent's fitness cannot adversely affect the rights of the other parent. And if that principle had been followed here, the elevation of Joseph's rights, whatever they were, could not have deprived Frank of the presumption that he was entitled to direct the upbringing of his children or that he was acting in their best interests.

But that is exactly what *Brooke S.B.* and the decision below did: By granting parental status to Joseph, and thus allowing him to compete with Frank for custody, the New York courts effectively deprived Frank and other biological parents of (1) the right to control the upbringing of their children by separating them from legal strangers, as Frank did when he moved to Florida, and (2) the presumption that they are acting in their children's best interests.

As previously explained, *Troxel* reaffirms the presumption that a fit parent will act in the best interests

of the child. The Michigan Supreme Court followed *Troxel* by granting a procedural right to biological parents: the right to a meaningful hearing, where the parent's rights can be evaluated based on that presumption. This is true even to the point of enforcing that presumption when the parents are in jail. But *Brooke S.B.* and the decision below both strip biological parents of this presumption: Frank, a fit parent, lost custody to his children's uncle and in doing so, never had the benefit of that presumption. And his loss of custody was based on a refusal to recognize the presumption that he was acting in their best interests when he removed them to Florida.

In short, this conflict with the Michigan Supreme Court likewise merits this Court's review.

III. This case is an excellent vehicle.

Finally, this case is an excellent vehicle for resolving the question presented. The fact that Frank moved the children to Florida away from Joseph was, in the trial and appellate courts' view, the dispositive factor in determining who now has the right to direct the children's upbringing. *E.g.* Pet. 7a-8a. But the conclusion that the move was problematic hinged on the trial court's and *Brooke S.B.*'s equation of the rights of Frank—a biological father—and Joseph, who is neither a biological nor an adoptive parent. That equalization contradicts *Pierce* and *Troxel.* The lower court's conclusion with respect to Frank's decision to move his family to Florida also deprived him of the presumption, established in *Troxel,* that he was acting in his children's best interests.

The result is that a biological parent has now been stripped of his ability to promote what he views as the well-being of his children. And other courts around the country are adopting rules that strip biological parents of this right, in conflict with other decisions that have preserved the rights protected by *Troxel* and *Pierce* in similar circumstances. Certiorari is urgently needed to clarify—and, indeed, to reaffirm—the constitutional rights of biological and adoptive parents.

CONCLUSION

The constitutional rights of fit biological and adoptive parents recognized by *Troxel* and *Pierce* are being eroded by lower courts. They will continue to flounder until this Court intervenes. This case presents a compelling vehicle for that needed intervention.

The petition should be granted.

Respectfully submitted,

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